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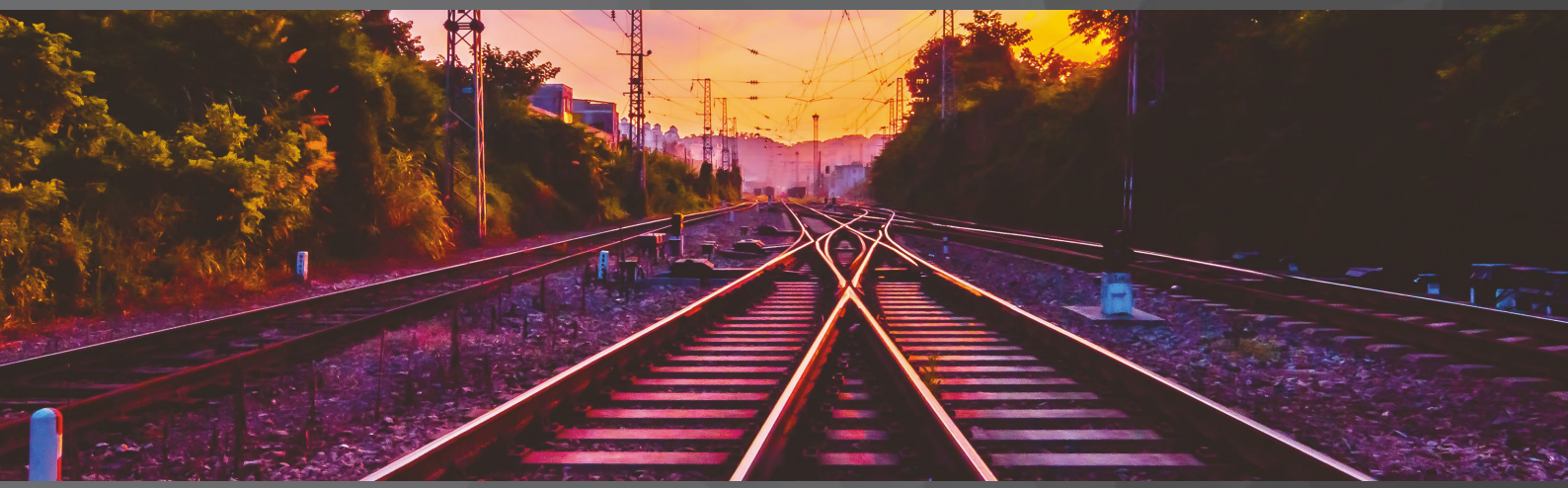

Merger Control 2020

A practical cross-border insight into merger control issues

16th Edition

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The most relevant merger authority in Germany is the *Bundeskartellamt* (Federal Cartel Office – "FCO") based in Bonn. The FCO is assigned to the Federal Ministry for Economic Affairs and Energy, but operates independently in its decision-making and is not subject to political directives. The FCO has 12 decision divisions that are autonomous and not subject to instructions by the FCO's president. The FCO's divisions are each responsible for certain industries. Thus, undertakings can generally expect decision-makers with sector-specific knowledge and experience.

1.2 What is the merger legislation?

The current merger legislation is set out in Sections 35–43a of *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints of Competition – "ARC") which was last amended on 18 July 2017. In addition, the FCO has issued several guidelines and notices for the interpretation and practice of merger control in Germany which are available (also in English) at www.bundeskartellamt.de.

1.3 Is there any other relevant legislation for foreign mergers?

In cases involving the acquisition by a non-German investor of a direct or indirect shareholding of 25% or more in a German company, a foreign investment filing with the German Federal Ministry of Economics and Technology under the Foreign Trade and Payments Ordinance (*Aussenwirtschaftsverordnung*) may be required. This applies to military activities as well as to so-called "critical infrastructure" (such as energy, IT, telecommunications, transport and haulage, health care, water, food, finance and insurance) and software of critical infrastructure.

1.4 Is there any other relevant legislation for mergers in particular sectors?

There is sector-specific legislation, and there are notification requirements for mergers in the media sector which may apply in addition to the general merger control rules. The Commission on Concentration in the Media Industry ("KEK") can intervene in media/broadcasting transactions in order to secure diversity of opinion, and in particular to prevent the creation of concentrated power of influence over opinion.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

In contrast to many other jurisdictions, German merger control is triggered not only by the acquisition of (sole or joint) control but also by the acquisition of a mere 25% of either the capital or the voting rights in a company, or, if the transaction would result in the purchaser obtaining a "competitively significant influence", even below the 25% threshold. In detail:

a. **The acquisition of all of, or a substantial part of, the assets of another undertaking:** This covers typical asset deals. However, the definition of a "substantial part of the assets" is very wide and can also cover the acquisition of individual trademarks or, for example, newspaper and magazine titles, if such assets constitute the principal basis for the seller's position in a particular market, and if the deal would transfer this market position to the purchaser.

b. **The acquisition of direct or indirect control over another undertaking or part thereof by one or several undertakings:** The concept of (sole or joint) control closely follows the definition contained in Article 3 of the European Merger Control Regulation ("ECMR") as further explained in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings. Control can be acquired through rights, contracts or other means which, either separately or in combination, and having regard to all considerations of relevant fact and law, confer the possibility of exercising decisive influence on the business activity of an undertaking.

c. **The acquisition of shares in another undertaking equalling or exceeding 25% or 50% of the capital or the voting rights of that undertaking, either separately or in combination with other shares already held by the undertaking:** German merger control is triggered by the simple acquisition of 25% or more of either the capital or voting rights in another company, irrespective of whether or not the shareholding will confer control or a significant influence over the target (all existing shareholdings of all entities of the purchaser's group have to be taken into account). Furthermore, a seller or another shareholder retaining 25% or more of the shares post-transaction is considered to be a party to the concentration which means that its turnover has to be taken into account when assessing the turnover thresholds.

d. The 50% threshold may trigger a second review, which means that an undertaking already holding shares between 25–49.9%, but reaching the 50% threshold with a later acquisition, needs to notify this acquisition.

e. **Any other combination of undertakings, enabling one or several undertakings to directly or indirectly exercise competitively significant influence over another undertaking:** This applies to acquisitions of minority shareholdings below the 25% threshold which, through contractual or other rights, would put the purchaser in the position equivalent to that of a shareholder holding 25% or more. "Competitively significant influence" is less than "control", but generally requires the acquisition of significant influence through addition rights ("plus factors") such as: (i) information rights in respect of the operative business of the target; (ii) the right to nominate members of the management board, the board of directors or the supervisory board; or (iii) *de facto* blocking minority on annual shareholder meetings. Such influence is considered competitively significant if the purchaser is a competitor of the target, or controls one; or if the purchaser or any of its group companies is party to a significant vertical supply relationship with the target. In the case *A-TEC/Norddeutsche Affinerie* (2008), the FCO held that the acquisition of a minority shareholding of 13.75% constituted a concentration (although the decision was revoked on appeal). Competitively significant influence is less than control but generally requires the acquisition of significant influence through addition rights ("plus factors") such as: (i) information rights in respect of the operative business of the target; (ii) the right to nominate members of the management board, the board of directors or the supervisory board; or (iii) *de facto* blocking minority on annual shareholder meetings. Such influence is "competitively significant" if the purchaser is or controls a competitor of the target, or if the purchaser or any of its group companies is party to a significant vertical supply relationship with the target. In the case A-*TEC/Norddeutsche Affinerie* (2008), the FCO held that the acquisitions of a minority shareholding of 13.75% constituted a concentration (the decision was revoked on appeal).

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

As set out under question 2.1, the mere acquisition of 25% or more of the shares or voting rights and in exceptional cases even non-controlling minority interests below 25% constitute a notifiable concentration.

2.3 Are joint ventures subject to merger control?

Joint ventures are subject to German merger control if the formal criteria of a concentration (see question 2.1) are satisfied. Unlike under the ECMR, it is not necessary for the joint venture to be a full-function autonomous economic entity. Accordingly, every transaction resulting in at least two independent shareholders holding 25% or more of the shares or voting rights in the same entity will be reviewed as a joint venture and – for the purposes of merger control – deemed to be a concentration of the parent undertakings with respect to the markets in which the joint venture is active. This means that the total sales figures of the respective parent undertakings will have to be considered in the turnover calculation for the jurisdictional test.

Within the merger control procedure, the FCO generally only reviews a joint venture's concentrative aspects. In contrast, any possible cooperative aspects, particularly with respect to the parent undertakings, are examined under the rules relating to anticompetitive agreements. This may result in situations where the FCO clears a transaction under merger control rules within the applicable time periods, but expressly reserves the right to review any cooperative aspects and to prohibit the transaction under the rules relating to anticompetitive agreements. As the FCO's review under these rules is not subject to any statutory time limits, this may cause uncertainties in implementing the transaction.

2.4 What are the jurisdictional thresholds for application of merger control?

German merger control applies if, in the last financial year prior to completion of the transaction:

I. Turnover Threshold
   (1) the combined worldwide turnover of all undertakings concerned exceeded EUR 500 million;
   (2) one undertaking concerned had a turnover exceeding EUR 25 million within Germany;
   (3) at least one further undertaking concerned had a turnover exceeding EUR 5 million within Germany (for the expected increase of this threshold to EUR 10 million, see question 6.3); but
   (4) not if one undertaking concerned had a worldwide turnover of less than EUR 10 million (in case of the target including the seller's group); or

II. Transaction Value Threshold
   (1) the combined worldwide turnover of all undertakings concerned exceeded EUR 500 million;
   (2) one undertaking concerned had a turnover exceeding EUR 25 million within Germany;
   (3) the transaction value amounts to more than EUR 400 million; and
   (4) the target has significant activities in Germany ("local nexus").

"Undertakings concerned" are generally the purchaser and the target. The seller's turnover is not considered in the calculation, unless the seller retains 25% or more of the target's shares.

Turnover figures must reflect consolidated net turnover (excluding taxes and after rebates and discounts) with third parties (intra-group turnover to be excluded) generated in the last completed financial year. However, the figures need to include and reflect acquisitions or divestitures executed after the end of the last completed financial year, i.e. turnover of a company sold during/after completion of the relevant financial year must as a whole be deducted, while turnover of a company acquired during/after the relevant financial year must be fully taken into account for the whole period of the relevant financial year. The geographic allocation of turnover must usually be based on the location where the products or services were provided (location of the customer). As regards banking income, this is the location of the branch where the income is generated.

The recently introduced "transaction value" threshold needs to be determined on the basis of the consideration of the target company (paid in any form), including assumed liabilities. This approach is different from the US size-of-transaction test which is focused on the acquisition of "fair market value". "Significant activities in Germany" refers to activities in Germany that do not yet account for significant turnover but have a high competitive potential, as indicated by, for example, the number of customers/users in Germany. The FCO has

published guidelines on the new provisions regarding the transaction value threshold and domestic effect.

If the transaction also exceeds the turnover thresholds of the ECMR (see the EU chapter), a notification only needs to be made to the European Commission without the need to go through an additional procedure in Germany (the "one-stop-shop" principle). However, if a transaction meets the ECMR turnover thresholds but does not qualify as a concentration under the ECMR (e.g. in cases of a non-controlling interest or a non-full-function joint venture), German merger control nonetheless remains applicable.

Special rules for the turnover calculation apply to: (i) traded goods; (ii) media turnover; (iii) insurance companies; and (iv) financial institutions.

2.5 Does merger control apply in the absence of a substantive overlap?

Transactions meeting the jurisdictional thresholds (see question 2.4) are subject to review, regardless of substantive overlaps.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

Foreign-to-foreign transactions are principally subject to German merger control if the jurisdictional thresholds are met, provided that they have an "appreciable effect" within the territory of Germany. If the jurisdictional thresholds are met, foreign-to-foreign concentrations will nearly always be considered to have such "appreciable effect". No appreciable effect can be argued in cases of a joint venture where only the parent companies meet the domestic turnover thresholds, while the joint venture itself does not have significant activities in Germany, and will not in the foreseeable future.

The FCO has published a "Guidance document on domestic effects in merger control", which is available on the FCO's website.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

Only the exclusive jurisdiction of the European Commission under the ECMR overrides German merger control rules if the turnover thresholds in Articles 1(2) and (3) ECMR are met and the transaction constitutes the acquisition of control, unless the Commission decides to refer the case to the FCO.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

If the same parties (i.e. same acquirer group and seller group) enter into two or more transactions concerning the acquisition of parts of a company or several companies within a two-year period, these transactions will be treated as a single concentration. The turnover thresholds will apply to the transactions as a whole to ensure that parties cannot avoid notification obligation by slicing a deal into staged transactions each falling below the relevant threshold.

Furthermore, mergers taking place in various stages will be reviewed as one single transaction if they are economically and/or legally linked by condition upon each other. This is the case if there is a contractual connection in the transaction agreements. However, even without a binding contractual link between the different stages, there may be other factual or economic reasons suggesting that the different stages constitute one single transaction.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Notification is mandatory if the jurisdictional thresholds are met (see question 2.4) and the legal requirements of appreciable domestic effects are met (see questions 2.6 and 3.2). There is no deadline for notification, but it is prohibited to complete the transaction prior to merger clearance (see question 3.7).

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

Members of a saving or cooperative banks association that primarily provide services for members of that association are exempted from German merger control.

Foreign-to-foreign concentrations are exempt from merger control requirements if they have no "appreciable effects" within the territory of Germany (see question 2.6).

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

The implementation of a notifiable concentration without merger notification and clearance can lead to severe fines. It constitutes an administrative offence with fines of up to 10% of the total groupwide turnover of the undertaking concerned in the preceding business year, or up to EUR 1 million for the individuals responsible for the offence. The FCO has used its power repeatedly in the past.

In cases of deliberate disregard of the notification obligation, the FCO regularly imposes fines. In cases of negligent disregard of the notification obligation, the FCO may refrain from imposing a fine if the undertakings violated the filing obligation for the first time, in particular if none of them has significant business activities in Germany and none of them has had previous experience with merger filings in Germany.

Legal acts implementing the concentration are void under German civil law. This means that, in particular, the acquisition of shares in German companies, or of assets located in Germany, are invalid, and IP rights of the target are not enforceable in Germany.

If the FCO becomes aware of a notifiable concentration that was not notified, it will normally initiate divestiture proceedings. Within the divestiture proceedings, the FCO will apply the same substantive test as within the merger control proceedings (see question 4.1). However, the timeframe for merger control proceedings (see question 3.6) does not apply; there are no statutory deadlines for divestiture proceedings. If the FCO

finds that the concentration does not meet the conditions for a prohibition, it will close the divestiture proceedings. In this case, the invalidity of any legal acts completing the concentration will be remedied with retroactive effect. If the FCO finds that the concentration meets the conditions for a prohibition, it will order the divestiture of the concentration.

In cases of notifications with incorrect or incomplete information, the FCO can impose a fine of up to EUR 100,000. If incorrect or incomplete information is included intentionally in order to cause the FCO to refrain from issuing a prohibition, the FCO can impose a fine of up to 10% of the total groupwide turnover of the undertaking concerned in the preceding business year, or up to EUR 1 million for the individuals responsible for the offence. In the case *Tönnies/Tummel* (2013) in which the majority shareholder of the acquirer did not provide information on another majority shareholding in a third company, despite the fact that this participation was highly relevant for the substantive assessment of the notified concentration, the FCO imposed a fine of EUR 90,000. In the case *Bongrain Europe SAS* (2016), the FCO imposed a fine in the same amount on Bongrain Europe SAS, since it had provided incorrect figures, understating the volume of sales both for a group company and the target company active on the same market.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

A carve-out or hold-separate solution is only possible if it is ensured that the completion outside of Germany will not have any effects on the markets within Germany. In practice, it will be difficult to find hold-separate solutions which ensure that a completion outside of Germany will have no impact whatsoever on the German markets. In the case *Mars/Nutro* (2008), the parties to the concentration completed the transfer of Nutro's shares in the US, while the German merger control proceedings were still pending with the FCO. The parties agreed to a carve-out, whereby the distribution rights for Germany remained with the seller. Although Nutro had no assets in Germany, the FCO held that by acquiring the trademarks and production facilities of Nutro, Mars had obtained all relevant assets that also formed the basis for the competitive position of Nutro products on the German market. The FCO held that Mars had deliberately ignored the suspension obligation and issued a fine of EUR 4.5 million for gun-jumping (see also question 3.7). Against the background of the FCO's strict practice, it is advisable to align with the FCO beforehand on potential carve-outs or hold-separate solutions.

3.5 At what stage in the transaction timetable can the notification be filed?

A concentration can be notified with the FCO at any time, provided that the parties can provide the mandatory information on the concentration (see question 3.8) with sufficient detail. No binding agreement or letter of intent is required. Since the concentration will receive clearance as notified, legally relevant changes to the transaction between initial notification and signing will not be covered by the clearance, unless notified anew. If the transaction is abandoned and the notification is withdrawn, a (reduced) filing fee will nonetheless be charged (see question 3.11).

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

Concentrations that are subject to merger control may not be completed before the FCO has either cleared the concentration or the relevant waiting period has expired. The law provides for two phases of merger control, with different waiting periods (i.e. deadlines for clearance):

Upon submission of a complete notification with the FCO, Phase 1 starts with a deadline of one month. If within Phase 1 the FCO finds that the concentration does not significantly impede effective competition, the FCO will in practice issue an informal clearance letter – although it is not legally obliged to do this. In the (improbable) absence of such clearance letter, the concentration is cleared with the lapse of the waiting period. The vast majority of the cases get clearance in Phase 1 – in the past three years (2016–2018), approx. 99% of all mergers notified in the respective year were cleared in Phase 1. In straightforward cases with no substantive overlaps or significant effects on the relevant markets, the FCO often issues clearance letters after two to three weeks from receipt of the notification, and in exceptional cases even earlier. However, this is entirely within the discretion of the FCO and depends largely on the workload of the respective case handler, as well as the FCO's knowledge of the relevant markets and the level of information provided in the notification.

If the case raises competitive concerns and a further examination of the concentration is necessary, the FCO must inform the notifying parties before the expiry of Phase 1 that it has initiated Phase 2 proceedings. The deadline for Phase 2 proceedings is four months from submission of the complete notification with the FCO. The notifying parties may voluntarily agree to an extension of the deadline for clearance in Phase 2. If a notifying party submits proposals for commitments to the FCO for the first time during the proceedings, the deadline for Phase 2 proceedings is extended by one month.

A "stop-the-clock" mechanism exists, whereby the time limit (only) in Phase 2 is suspended if the notifying parties do not respond to an information request in full or in a timely manner. For the stop-the-clock mechanism to come into effect, the FCO has to issue a second information request after the respective undertaking failed to comply with the previous information request. The suspension ends as soon as the undertaking has submitted all the information requested to the FCO.

The notifying parties may submit proposals for commitments at any time of the Phase 2 proceedings (see question 5.4) and may also withdraw the notification at any time of the proceedings (see question 5.1).

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

It is prohibited to implement a notified transaction before clearance is received or the compulsory waiting period has expired. A violation of this suspension obligation is an administrative offence with fines of up to 10% of the total groupwide turnover of the undertaking concerned in the preceding business year, or up to EUR 1 million for the individuals responsible for the

offence. The FCO has imposed severe fines for gun-jumping in the past (see also question 3.4). In addition, legal acts implementing the concentration prior to merger clearance are void under German civil law (see question 3.3).

The Federal Court of Justice ("FCJ"), in the case *Edeka/Kaiser's Tengelmann* (2017), decided that the suspension obligation also extends to partial implementation of the transaction. According to the FCJ, measures or acts which, as such and taken in isolation, do not constitute a concentration, but which are carried out in connection with an intended concentration and are capable of anticipating the effects of the concentration at least partially, are subject to the suspension obligation. The FCJ confirmed a prohibition to implement a framework agreement on a purchase cooperation.

In addition to the suspension obligation stipulated by law, the FCO may, by administrative order, prohibit specific measures or acts which could implement a transaction. In the case *Edeka/Kaisers' Tengelmann*, the FCO, *inter alia*, ordered the notifying parties not to implement a purchase cooperation, not to close certain warehouses and meat production facilities nor to diminish their economic value, and not to cut-back on certain administrative functions; this was upheld by the Higher Regional Court of Düsseldorf.

The notifying parties may apply for an exemption from the suspension obligation for important reasons, in particular to prevent serious damage to an undertaking concerned or to a third party. The exemption may be granted at any time, even prior to notification. Any exemption from the suspension obligation is only of a temporary nature, until a decision in the merger control proceedings has been taken. When deciding on the exemption, the FCO will also take into account the likely outcome of the merger control proceedings.

3.8 Where notification is required, is there a prescribed format?

There is no prescribed format for a merger notification in Germany. Merger notifications are usually made in the form of a letter containing the information required by law, which comprises:

- the form of the concentration;
- name, place and type of business for each undertaking concerned;
- turnover in Germany, in the European Union and worldwide on a groupwide basis;
- in cases in which the transaction value threshold applies, the value of the consideration including the basis for its calculation, as well as information on the operations in Germany;
- the market shares, including the basis for their calculation or estimate, if the combined shares of all undertakings concerned amount to at least 20% in Germany or in a substantial part thereof;
- in the case of an acquisition of shares, the size of the interest acquired and of the total interest held; and
- a person authorised to accept service in Germany, if the registered seat of the undertaking is not located within Germany.

In cases of an acquisition of assets or shares, information has to be provided on the seller also: the name; place of business; and a person authorised to accept service in Germany.

Once a cleared transaction has been completed, the notifying parties have to give notice of the completion to the FCO without undue delay. Although non-compliance is an administrative offence, notice of completion is merely a formality.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

There is no short-form or accelerated procedure under German merger control law.

The chances of a swifter procedure are improved by providing a higher level of information in the notification than the legally required minimum; in particular, information on the relevant markets, main competitors, customers, etc.

In complex cases, in particular where it seems possible that the FCO might raise competitive concerns, informal pre-notification discussions with the decision-making chamber are helpful.

3.10 Who is responsible for making the notification?

The undertakings concerned are obliged to make the notification; and in cases of the acquisition of shares or assets, also the seller(s). If a complete notification is submitted by one party, the other undertakings concerned are relieved of their obligation to notify. In practice, the notification is often submitted by the purchaser with the consent of all the other undertakings concerned.

3.11 Are there any fees in relation to merger control?

There is a statutory filing fee, the amount of which is determined according to the personnel and material expenses of the FCO, taking into account the economic significance of the concentration. The maximum statutory fee is EUR 50,000, which may be increased by up to EUR 100,000 in exceptional cases. For straightforward clearances in Phase 1, the filing fee often ranges from between EUR 3,000 to EUR 10,000. The FCO's decision on the filing fee is issued together with the decision to clear or prohibit the concentration.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

The law provides that acquisitions by way of a public takeover bid may be implemented prior to merger clearance, provided that the concentration is notified to the FCO without undue delay and that the acquirer does not exercise the voting rights attached to the shares unless authorised by the FCO.

3.13 Will the notification be published?

The FCO will publish the fact that the parties have submitted a notification on its website a few days from receipt of the notification, including the names of the undertakings concerned and the economic sector concerned. The merger notification itself will not be published (regarding access of third parties to the FCO's file, see questions 4.4 and 4.6).

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The FCO principally applies the same substantive test as the

European Commission, that is, whether the proposed transaction would lead to a significant impediment to effective competition ("SIEC"), in particular by "creating or strengthening a dominant position".

For a finding of single and collective dominance, the German merger control regime provides for the following – rebuttable – presumptions: a single undertaking has a share of at least 40% of the market; three or fewer undertakings possess an aggregated share of at least 50% of the market; or five or fewer companies hold a combined market share of at least two-thirds. However, in the FCO's decision practice, these presumptions play only a very limited role, with the authority reviewing the competitive effects brought about by the proposed merger in their overall context. In fact, the presumptions merely provide an indication as to whether a deal requires closer scrutiny.

The cooperative aspects of joint ventures will, in addition, be examined under the rules relating to anticompetitive agreements (see question 2.3).

A merger that leads to an SIEC will not be prohibited if one of the following exemptions apply:

- the requirements of the balancing clause are met, i.e. the undertakings concerned prove that the merger leads to pro-competitive effects on a different market that outweigh the negative effects on the affected market;
- the dominant market position applies to a newspaper or magazine publisher acquiring a small or medium-sized publisher, if certain prerequisites are met; or
- the conditions for a prohibition exclusively relate to a so-called *de minimis* market. This is a market (i) whose total market volume amounted to less than EUR 15 million in the last calendar year (for the expected increase of this threshold to EUR 20 million, see question 6.3), (ii) in which services are not rendered free of charge, and (iii) which has been in existence for more than five years. The market value is to be assessed on the basis of the German market, even if the actual geographic market is wider. If the actual geographical market is narrower than the German territory, then the respective narrower market is taken as a basis for the calculation. In certain exceptional and clearly defined circumstances, the FCO may bundle similar neighbouring local or regional markets for the purposes of assessing the de minimis market clause. This exception does not apply if the transaction is only notifiable due to its transaction value (see question 2.4).

4.2 To what extent are efficiency considerations taken into account?

Efficiencies may be taken into account as part of the SIEC test and in the context of the balancing clause (see question 4.1) if it can be shown that they have a direct effect on the competitive conditions of the market.

However, it is generally difficult to succeed with efficiency arguments in a merger case if a dominant position is created or strengthened. The FCO takes the view that dominant undertakings are generally unlikely to pass on efficiencies to the consumer. In its Guidance on Substantive Merger Control, the FCO sets out additional arguments against efficiency considerations in the merger control analysis.

4.3 Are non-competition issues taken into account in assessing the merger?

At the level of the merger control review by the FCO, non-competition issues are not relevant and will not be taken into account.

Since the FCO acts independently and free from political influence, attempts to lobby or even to exercise political influence almost always prove to be counterproductive.

However, a prohibition decision by the FCO may be overruled by the Federal Minister for Economic Affairs and Energy if the anticompetitive effect of the merger is outweighed by benefits to the economy as a whole or if the merger is justified by an overriding public interest. The Minister has discretion with regard to this analysis. The practical relevance of the ministerial permission is very limited. Since its introduction in 1973, only 22 applications for ministerial permissions have been filed, and only nine approvals have been granted (most of them with remedies; latest case: *Edeka/Kaisers' Tengelmann* (2016)).

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Upon application, third parties, such as competitors, customers or suppliers may formally participate in the merger control process as intervening parties if their commercial interests are materially affected by the merger.

Third-party interveners have a strong role with the right to be heard, access to the file (including non-confidential copies of the merger filing and any additional correspondence of the parties with the FCO) and full rights of appeal against the FCO's decision. Thus, it can be an attractive proposition to become an intervener in order to challenge (certain parts of) the transaction, resulting in remedies that may form attractive acquisition opportunities.

In addition to formal participation, any party may comment to the FCO in the course of a merger control review process (see question 4.5).

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

While the German merger control rules do not provide for a mandatory submission of internal documents prepared in connection with a transaction, such documents can be requested by way of an information request and reviewed by the FCO during the course of the merger review. Therefore, utmost care is required when drafting internal documents in preparation for the transaction and presenting it to either boards or investors; in particular, when it comes to the expected effects of the transaction.

In addition, the FCO may request detailed market and turnover information from the undertakings concerned and its affiliates, including affiliates located abroad. The FCO may also perform market investigations as part of the review. To this effect, it will send information requests to other market participants to obtain first-hand information and opinions from third parties. Usually, the response deadlines to such questionnaires are relatively tight.

The information can be requested informally or by way of a formal information request. For formal requests, compliance is legally required and the FCO has the power to impose fines in cases of non-compliance of up to EUR 100,000. Also, the FCO may "stop the clock" if the undertakings concerned fail to supply requested information timely (see question 3.6).

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The information provided by the parties will not be disclosed to

the public during the regulatory process (see question 3.13). In cases in which an intervener or another undertaking concerned is granted access to the file, the FCO is legally obliged to protect business secrets (such as turnover and market share information, as well as information with strategic relevance) and will normally ask the undertaking(s) concerned to submit non-confidential versions of the relevant documents before disclosing it to other parties.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

For the end of Phase 1, see question 3.6. Phase 2 ends with a formal decision stating whether the concentration is prohibited or cleared. If the FCO, contrary to this requirement, does not serve a formal decision to the notifying parties, the notified concentration is deemed to be cleared with the lapse of the waiting period. The formal decision contains a detailed reasoning and is published in a non-confidential version on the FCO's website.

The regulatory process ends with closure if the parties withdraw the notification. This is often done when the FCO signals that it will otherwise prohibit the concentration.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

When the FCO reaches the preliminary conclusion that a concentration raises competition concerns, the parties can offer commitments in Phase 2 to secure conditional approval. The FCO is obliged to accept conditions and obligations if they effectively remedy the competition concerns.

Structural remedies are generally the most likely to be accepted by the FCO, with the FCO having a clear preference for divestments. There also exists the possibility of behavioural remedies that are equivalent to divestitures in their effects (provided that they do not require permanent monitoring of the behaviour).

Conditions precedent (in which case the merger may not be implemented until the condition is satisfied), such as upfront buyer solutions, are generally preferred by the FCO. Subsequent conditions and obligations will only be accepted in exceptional cases.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

The FCO may require remedies to foreign-to-foreign mergers as for all other mergers under review. For any concentration (whether domestic or foreign-to-foreign), the parties may have to make commitments to parts of their business outside of Germany, if necessary to effectively remedy the competition concerns.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The notifying parties may submit proposals for remedies at any time of the Phase 2 proceedings. The first proposal for remedies extends the review period in Phase 2 by one month. The FCO will require sufficient time to assess any proposed remedies before expiry of Phase 2, and if asked, the parties will normally grant an extension of the statutory review period to negotiate appropriate remedies.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The FCO has developed standard texts for conditions precedent, conditions subsequent, obligations, and trustee mandates, which are published on its website and are also available in English. They are not mandatory, but used as a model. In 2017, the FCO also published guidance on remedies on its webpage in English.

5.6 Can the parties complete the merger before the remedies have been complied with?

In case of a clearance with condition precedent, the concentration may not be implemented until the condition is satisfied, without breaching the suspension obligation (see question 3.7).

In case of a clearance with a subsequent condition or obligation, the merger may be implemented, but clearance becomes invalid or may be revoked if the remedies are not complied with (see question 5.7).

5.7 How are any negotiated remedies enforced?

In cases of a condition precedent, if the condition is not implemented within the stipulated timeframe, clearance will not occur and the prohibition of the implementation the concentration will continue to apply.

In cases of a subsequent condition, the clearance will lapse if the commitment is not implemented within the stipulated timeframe and the concentration will have to be dissolved. In cases of a clearance with an obligation, the clearance may be revoked if the obligation is not met.

5.8 Will a clearance decision cover ancillary restrictions?

A clearance decision does not usually cover ancillary restrictions but is limited to merger specific aspects. Consequently, ancillary restrictions such as non-compete obligations do not benefit from the clearance decision, and may be subject to review under the rules relating to anticompetitive agreements (see question 2.3). Such restrictions are lawful if they are necessary and indispensable to the successful implementation of the concentration. The FCO usually follows the guidelines of the European Commission as set out in the Notice on restrictions directly related to and necessary for concentrations.

5.9 Can a decision on merger clearance be appealed?

A clearance decision in Phase 1 proceedings cannot be appealed by any party, including third parties. A clearance decision in Phase 2 can be appealed by third parties who have formally participated in the proceedings (interveners), or by the undertakings concerned in cases of gravamen, i.e. in case of remedies.

A prohibition decision can be appealed by all undertakings concerned.

If a merger is prohibited, the undertakings concerned may also apply for a ministerial permission within one month (see question 4.3).

5.10 What is the time limit for any appeal?

An appeal against a decision by the FCO must be lodged with the Higher Regional Court of Düsseldorf within one month from service of the decision.

5.11 Is there a time limit for enforcement of merger control legislation?

There is no time limit for the opening of divestiture proceedings or a divestiture order.

The right to impose fines for breach of the suspension obligation is subject to a statutory time limit of five years starting from the termination of the violation. Since the FCO regards the breach of the suspension obligation as a permanent, ongoing violation, which continues as long as the merged undertaking is active on the market, the time limit starts only when the undertaking concerned ceases to operate on the market.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

The FCO has a close involvement with and a leading role in both the European Competition Network and the International Competition Network, whose current chair is Mr. Mundt, the president of the FCO. The close communication between the authorities demands consistent approaches in merger filings of transactions that require filings in multiple jurisdictions.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

According to the statistics of the FCO for 2018, 1,383 merger projects were notified to the FCO, eight of which went through an in-depth second phase review (three were cleared unconditionally, one case was cleared with remedies and four notifications were withdrawn by the notifying parties). No case was prohibited.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

The 10th amendment of the ARC, which can be expected to come into force in the course of 2020, will most likely include some modifications of the German merger control regime, which shall allow the FCO to better focus on the most important concentrations. The current proposal for the amendment increases the second domestic turnover threshold (see question 2.4) from EUR 5 million to EUR 10 million (making the previous exemption for targets with a worldwide turnover of less than 10 million, including the seller, needless). In addition, the turnover threshold for the *de minimis* market exemption (see question 4.3), shall be increased from EUR 15 million to EUR 20 million. The FCO can also be expected to remain at the forefront of the assessment of transactions in the area of Internet, Online and Big Data, and to seek to apply in these areas both traditional and new tools granted in connection with the latest reform on merger control proceedings.

6.4 Please identify the date as at which your answers are up to date.

These answers are up to date as of 8 November 2019.

7 Is Merger Control Fit for Digital Services and Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

Over the past few years, there has been an intense debate amongst academics, the competition authority, the ministry responsible for legislation on competition law and practitioners concerning the impact of digitalisation on competition law. The debate also has relevance for digital mergers; in particular, with regard to the role of platforms within concentrated markets, as well as the role of data as a critical resource (see below questions 7.2. and 7.3). Further, it is expected that the 10th amendment of the ARC will bring substantial new rules with respect to digitalisation.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

The ninth amendment of the ARC, which came into force on 9 June 2019, includes regulations that have implications for mergers in the digital economy.

It is now established that a service being provided free of charge does not preclude the existence of a market. This is intended to embrace multi-sided markets, such as digital products financed by advertising revenue, which enable one user group to use a product for free, while other user groups pay a price for the placement of the advertisements. In addition, the new provision seeks to cover digital-commerce scenarios in which services are offered for free during the initial market-launch period, but a charge is then levied once a critical number of users is achieved. The role of the provider within these kinds of markets will, it is hoped, be integrated more efficiently into the merger control framework.

Furthermore, for the assessment of an undertaking's market position in the case of multi-sided markets and networks, the ninth ARC amendment provides that consideration also be given to direct and indirect network effects and their economies of scale, access to competition-relevant data, the parallel use of multiple services and the switching costs for the user, and innovation-driven competitive pressure in the digital economy. These new provisions arose because, within merger-control assessments of market and competitive relationships, applying competition-economics concepts which are focused primarily on the reactions of consumers to price increases (e.g. the SSNIP test) is problematic when one of the user groups in question is not charged any price at all. The same applies to the assessment of market power on the criteria of revenue-based market share.

Moreover, a new, value-based threshold for triggering merger controls has been introduced, since, in the digital economy in particular, an undertaking's low revenue does not always equate with low levels of competitive significance (see question 2.4).

The next amendment to the ARC is already being planned, and this will also address issues raised by digitalisation.

These changes affect not only the core digital economy, but also many other industries that deal with the large data pools known as "big data", such as healthcare, energy, telecommunications, insurance, banking, hospitality or transport.

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

The FCO has dealt with some digital mergers, e.g. the merger of two online dating platforms (case no. B6-57/15) and the merger of two online real estate platforms (case no. B6-39/15), as well as the intended merger concerning a ticketing platform (case no. B6-35/17). While the FCO has not explicitly highlighted any difficulties in these cases, it has taken into account the particularities of (digital) platform markets in each respective assessment. It is interesting to note, however, that two of the three cases mentioned above had to go into the second phase of merger control proceedings, which is rare in Germany.

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